

# **Terrorism and Extraterritorial Jurisdiction in Criminal Cases: Recent Developments in Brief**

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**Extraterritorial Jurisdiction:** The Constitution provides the power to enact criminal laws with extraterritorial application. It vests Congress with, among other things, the power “to regulate commerce with foreign nations . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations . . .” and gives Congress legislative jurisdiction over places acquired “for the erection of forts, magazines, arsenals, dock-years, and other needful buildings.”

The Constitution also limits the manner in which this authority may be exercised. The due process clause of the Fifth Amendment, for instance, bars the extraterritorial application of federal criminal laws in the absence of a connection between the crime, the defendant, and the United States. Prosecution requires personal jurisdiction over the defendant and subject matter jurisdiction over the crime. Nevertheless, neither due process nor any other Constitutional limitation have posed any serious obstacle to the enactment and enforcement of federal law for crimes committed abroad. In fact, the extraterritorial application of federal law is frequently said to be a matter of intent rather than power, of statutory construction rather than constitutional limitation.

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When a statute contains a statement of its extraterritorial application, Congress's intent is clear. When the statute is silent, the courts begin with a presumption against extraterritorial application. The nature of the statute, however, may be sufficient to overcome the presumption, so long as the application beyond the borders of the United States does not offend the principles of international law. The courts will find no offense to international law as long as the application features reasonable contacts between the crime and the nation asserting jurisdiction. That standard is often judged by whether the case comes within one of five circumstances or "principles" under which international law recognizes a nation's prerogative to assert the application of its laws: (1) the objective territorial principle where external conduct has a substantial effect within the country; (2) the protective principal where the outside conduct is directed against the country's national security; (3) the nationality principle where the offender is one of the country's nationals; (4) the passive personality principle where the victim is one of the country's nationals; and (5) the universality principle where the conduct, such as piracy, is universally condemned and may be prosecuted by any country that can capture the offender.

The inventory of federal crimes with extraterritorial application already includes prohibitions on crimes of violence committed against federal officials and employees, the theft or destruction of federal property, efforts to smuggle drugs or foreign nationals into this country, and aircraft hijacking, to name a few. Legislation during the 107<sup>th</sup> Congress augments the store with authority to prosecute: (a) crimes committed by or against Americans on military and diplomatic installations and residences overseas; (b) fraud involving American credit cards or other "access devices" committed abroad; (c) laundering the proceeds of various federal crimes in a foreign bank; (d) laundering in this country of the proceeds of foreign political corruption and of an expanded list of other foreign crimes; (e) terrorist bombings abroad; and (f) the overseas financing of terrorism.

**Common Law Crimes on American Facilities Overseas:** Section 804 of the USA PATRIOT Act addresses a difference of opinion among the lower federal appellate courts over whether the federal laws that outlaw such crimes as murder, rape, and robbery when committed within federal enclaves in this country also apply on American governmental installations abroad. With the enactment of section 804, they do; at least when either the victim or the offender is a U.S. national. The dispute centers on the construction of 18 U.S.C. 7(3) which defines the special territorial jurisdiction of the United States. The Fourth and Ninth Circuits contend that the definition in subsection 7(3) includes areas in other countries over which the host nation has afforded the United States privileges akin to sovereignty. The Second Circuit argues that the subsection is intended to encompass only those areas over which Congress may exercise legislative jurisdiction of the kind ordinarily vested in the Several States.

The Fourth Circuit has held that at least some areas located in other countries might be considered within the special territorial jurisdiction of the United States as described in subsection 7(3), *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973). *Erdos* upheld the conviction of an American diplomat for the crime of manslaughter committed in the American embassy in Equatorial Guinea. *Erdos* saw two grounds for territorial jurisdiction within subsection 7(3): [1] "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or" [2] "any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal,

dockyard, or other needful building.” It concluded that by virtue of “the practical usage and dominion exercised over the embassy or other federal establishment by the United States government. . . . 18 U.S.C. 7(3) is a proper grant of special territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction,” 474 F.2d at 159-60.

Courts in the Second Circuit read subsection 7(3) differently. *United States v. Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000) involved the terrorist bombing of American embassies in Kenya and Tanzania. Unlike *Erdos*, it held that the American embassies abroad were not within the special territorial jurisdiction of the United States and that statutes outlawing murder and maiming within the territorial jurisdiction of the United States (18 U.S.C. 1111, 114) had no extraterritorial application, 92 F.Supp.2d at 204-16. The Court of Appeals for the Second Circuit came to much the same conclusion. It reversed a conviction under 18 U.S.C. 2243 (sexual abuse of a minor within the territorial jurisdiction of the United States) for a statutory rape which occurred in a housing complex on a U.S. military base in Germany, *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000). *Gatlin* based its conclusion that subsection 7(3) has no extraterritorial application on three factors. First, a statute is presumed to have no extraterritorial application absent a clear indication to the contrary. Second, *Gatlin* read the subsection’s legislative history as an indication that Congress intended the subsection to apply solely within the United States. Third, it pointed out that after *Reid* and *Kinsella*, Congress, the Executive Branch, and commentators had all described as beyond federal jurisdiction those crimes committed by dependents and contractors on overseas military bases – all assuming that subsection 7(3) had no extraterritorial application, 216 F.3d at 214-22.

The Ninth Circuit could not agree, *United States v. Corey*, 232 F.3d 1166 (9th 2000). *Corey* involved the conviction of a civilian postal employee for sexual abuse committed in military housing in Japan and in a residence rented by the U.S. embassy in the Philippines. *Corey* found the presumption against extraterritoriality unpersuasive and not particularly relevant. In its mind, jurisdiction was territorial (not extraterritorial) no matter where the property was located as long as it was acquired for “needful” purposes and as long as U.S. legislative jurisdiction over the property was exclusive or concurrent, 232 F.3d at 1170-171. It found support in the history of subsection 7(3) which had been applied over time to territory beyond the confines of any admitted state or beyond the continental boundaries of the United States, 232 F.3d at 1173-176.

Congress resolved the dispute, or at least greatly mitigated its consequences, when it enacted section 804 of the USA PATRIOT Act and the Military Extraterritorial Jurisdiction Act of 2000. The Military Extraterritorial Jurisdiction Act treats felonies, committed anywhere overseas by members of the armed forces or those accompanying or employed by them, as if they were committed within the territorial jurisdiction of the United States, 18 U.S.C. 3261. Section 804 of the USA PATRIOT Act creates a new territorial subsection in 18 U.S.C.7: the special territorial jurisdiction of the United States includes the overseas business premises of federal governmental entities and the residences of the members of their staffs, but only for crimes committed by or against Americans (other than those who come within the military extension of 18 U.S.C. 3261). The split in the circuits remains of consequence for crimes committed in federal overseas facilities by foreign nationals who are not associated with the U.S. armed forces. In the Fourth and Ninth Circuits, such crimes may come within the territorial jurisdiction of the United States. In the Second Circuit, they do not.

**Credit Card Fraud Overseas (Fraud and Related Activity in Connection with Access Devices Abroad):** Section 1029 of title 18 proscribes counterfeiting or trafficking in counterfeit or unauthorized “access devices” or attempting or conspiring to do so “if the offense affects interstate or foreign commerce.” Thus, prior to the addition of subsection (h), the section would have been thought to have extraterritorial application when the offense affected the interstate or foreign commerce of the United States. Subsection (h) might be construed to limit the overseas application of section 1029 to circumstances involving an American issuer of the depicted “access device” and some contact between the United States and the material used in the offense or the profits from it. Alternatively, it might be construed as an explicit confirmation that the section applies under these circumstances, but without intending to foreclose other circumstances justifying application abroad.

**Money Laundering:** The money laundering provisions of 18 U.S.C. 1956 proscribe money laundering or more exactly, “financial transactions” related in various ways to a “specified unlawful activity.” It creates six distinct crimes: (1) laundering with intent to promote an illicit activity; (2) laundering to evade taxes; (3) laundering to conceal or disguise; (4) smurfing (structuring transactions to avoid reporting requirements); (5) international laundering; and (6) laundering part of a law enforcement sting.

The extraterritorial aspects of section 1956 come in two forms. First, the statute prohibits transactions in this country related to certain crimes in other countries. Second, the section specifically asserts extraterritorial jurisdiction over transactions in other countries which involve more than \$10,000 and either the participation of an American or conduct occurring within the United States, 18 U.S.C. 1956(f).

Section 318 of the USA PATRIOT Act expressly eliminates any requirement that the triggering financial transactions occur in an American bank or other American financial institution by changing the applicable definition of financial institution to include foreign banks. Whether this is intended as an implicit repeal of the requirements subsection 1956(f) is unclear. The amendment allows for extraterritorial application in instances where subsection 1956(f) would not. Subsection 1956(f), for example, does not reach transactions of less than \$10,000 or foreign transactions by a foreign national relating to specified illegal activity committed in the United States. The report of the House committee in which this proposal originated makes it clear that the provision was crafted to fill in gaps in existing law. On the other hand, the courts do not favor repeal by implication, *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 122 S.Ct. 593, 606 (2001) (“the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable”). Yet it is possible to read the amendment and subsection 1956(f) consistently, *i.e.*, each independently describes circumstances under which extraterritorial jurisdiction may be asserted without reference to the other.

Section 315 of the Act supplements the 18 U.S.C. 1956 definition of “specified unlawful activity” to include (when the financial transaction occurs at least in part in the U.S.) a wider range of foreign crimes such as crimes of violence, foreign official corruption, various smuggling offenses, and crimes for which we have extradition obligations under a multinational treaty. It also adds sundry smuggling offenses, gun running, computer fraud and abuse, and felony violations of the Foreign Agents Registration Act of 1938 to the definition of the specified unlawful activity.

**Treaty Implementation:** Contemporaneous with Senate approval of the International Conventions for the Suppression of Terrorist Bombings and of the Financing of Terrorism, Congress enacted implementing criminal provisions that feature extraterritorial components. Subsection 2332f(a) bans the use of nuclear materials, chemical weapons, explosives, or biological weapons against public places or governmental facilities and utilities or attempting or conspiring to do so. Violations are punishable in the same manner as violations of 18 U.S.C. 2332a(a)(use of weapons of mass destruction against federal property or an American abroad), *i.e.*, imprisonment for any term of years or life and if death results from commission of the offense the offender may also be subject to the death penalty.

The extraterritorial reach of the new statute runs parallel to several existing statutes which prohibit international terrorism; the unlawful use of chemical or biological weapons, nuclear materials, explosives, or weapons of mass destruction; or attacks on aircraft, airports, mass transit, diplomatic officials, or federal employees. It is somewhat distinctive in that it may be enforced when the offense is committed overseas and subsequently the offender is found here or has been brought here. No other connection to the United States is needed. The section does not become effective, however, until the treaty provisions it implements come into effect for the United States – a limitation without which any claim to legislative jurisdiction in some instances might be suspect.

Newly enacted section 2339C condemns (1) providing or collecting funds to be used for terrorist purposes or (2) concealing information concerning funds used to support terrorism. Subsection 2339C(a), the financing provision which also outlaws attempts and conspiracies, applies where the funds are to be used in support of the commission of either an offense covered in any of the various specified anti-terrorism treaties or an act of terrorism intended to cause death or serious injury. The underlying treaty offenses include the following federal crimes and their foreign equivalents: 18 U.S.C. 32 (destruction of aircraft or aircraft facilities); 18 U.S.C. 37 (violence at international airports); 18 U.S.C. 112, 878, 1116, 1117, 1201 (assault, threats, murder, manslaughter, attempted murder, kidnaping of internationally protected persons); 18 U.S.C. 831 (nuclear materials offenses); 18 U.S.C. 1203 (hostage taking); 18 U.S.C. 2280 (violence against maritime navigation); 18 U.S.C. 2281 (violence against fixed maritime platforms); and 49 U.S.C. 46502 (aircraft piracy). Violations are punishable by imprisonment for not more than 20 years, a fine of not more than \$250,000 for individuals or not more than \$500,000 for organizations, and/or a civil penalty of at least \$10,000, 18 U.S.C. 2339C(d)(1),(f).

The financing subsection applies overseas if the offender is an American, if the target of the underlying terrorism is the United States government, an American, or an American entity, or (when the Financing Convention becomes effective for the U.S.) if the offender is subsequently found in the United States, 18 U.S.C. 2339C(c). The subsection has several counterparts elsewhere in federal law, most notably 18 U.S.C. 2339B (providing material support to terrorists organizations), 18 U.S.C. 2339A (providing material support to terrorists), and 18 U.S.C. 2 (aiding and abetting). The extraterritorial reach of subsection 2339C(a) when it may be based on the presence of the offender of the United States is more sweeping than the most expansive of these. Section 2339B proscribes aid to groups designated foreign terrorist organizations by the Secretary of State as threats to U.S. national security or the national security of U.S. nationals and has a general extraterritorial jurisdiction provision, 18 U.S.C. 2339B(d) (“There is extraterritorial

federal jurisdiction over an offense under this section”). Subsection 2339C(a) is limited neither to designated terrorist organizations nor to terrorism directed against American national security interests – the subsequent presence of the financier in the U.S. is enough.

Section 2339A prohibits aid to a terrorist in the commission of any of a list designated for federal predicate offenses. It has no explicit extraterritorial provisions but almost certainly has extraterritorial application by virtue of the extraterritorial features of its predicate offenses. Subsection 2339C(a)’s predicate offense list is more extensive than that of section 2339A and consequently its extraterritorial reach is greater.

Section 2 imposes the same criminal liability upon those who aid and abet the commission of a crime as those who actually commit it. It carries the extraterritorial reach of the underlying offenses. Although more extensive than the predicate offense list of section 2339A, section 2 cannot stand on the full range of foreign law offenses available to subsection 2339C(a). Moreover, this section requires a completed predicate federal crime. There is ordinarily no crime to attempt to aid and abet nor to aid and abet an unsuccessful criminal effort. Subsection 2339C(a) suffers from neither limitation.

Prior to the Convention for the Suppression of the Financing of Terrorism entering into force for the United States, however, subsection 2339C(a) will not reach those overseas acts of financial support for terrorism offenses whose only connection to the United States is the subsequent presence of the offender in this country.

**Concealment:** Section 2339C also contains a concealment offense with extraterritorial application. Subsection 2339C(c)(concealment) only extends to those violations abroad that are committed by U.S. nationals or American entities. Section 2 appears to offer broader extraterritorial coverage, since its parallel prohibition on aiding and abetting violations of subsection 2339C(a)(financing terrorism) and 2339B enjoys the benefit of their extraterritorial application without any offender citizenship requirement. On the other hand, where their proscriptions overlap subsection 2339C(c) provides an additional penalty option since section 2 carries the same criminal penalties as the underlying offense (*i.e.*, imprisonment for not more than 20 years plus fine) but not a civil penalty.

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